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ARTICLE 1904 BINATIONAL PANEL REVIEW

Pursuant to the

NORTH AMERICAN FREE TRADE AGREEMENT

IN THE MATTER OF:	
Certain Softwood Lumber Products from Canada: Final Affirmative Determination of Sales at Less Than Fair Value	Secretariat File No. USA-CDA-2017-1904-03

DECISION OF THE PANEL ON SECOND REMAND

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I. INTRODUCTION

This Panel was established pursuant to Article 1904(2) of the North American Free Trade Agreement (NAFTA) to review the Final Affirmative Less Than Fair Value Determination issued by the U.S. Department of Commerce (Commerce or the DOC) in an antidumping investigation of certain softwood lumber products from Canada.[1] In its Decision and Order of October 5, 2023, the Panel affirmed certain aspects of Commerce's Determination and remanded three matters for further explanation, including Commerce's differential pricing analysis concerning the calculation of antidumping duties.[2]

The Department of Commerce filed its Final Results of Redetermination on April 30, 2024.[3] In Redetermination I, Commerce explained its position concerning the three remanded matters, including the differential pricing analysis. On July 1, 2024, the Panel stayed proceedings until issuance of the decision of the U.S. Court of Appeals for the Federal Circuit in *Stupp Corp. v. United States,* File No. 2023-1663.[4] On April 22, 2025, the Court of Appeals ruled in *Marmen III* that the DOC's reliance on the Cohen's *d* test was unreasonable when the sets of data being compared did not meet the assumptions of normal distribution, equal variance, and sufficient and

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[1] *Certain Softwood Lumber Products from Canada: Final Affirmative Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances*, 82 FR 51806 (November 8, 2017). The period of investigation (POI) was from October 1, 2015 to September 30, 2016. *See also Certain Softwood Lumber Products from Canada: Antidumping Order and Partial Amended Final Determination*, 83 FR 350, January 3, 2018]

2 NAFTA Panel Report, *Certain Softwood Lumber Products from Canada: Final Affirmative Determination of Sales at Less Than Fair Value*, Secretariat File No. USA-CDA-2017-1904-03, Decision and Order, October 5, 2023 (Panel Report).

[3] *Softwood Lumber Products from Canada: Final Affirmative Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances,* Secretariat file No USA-CDA-2017-1904-03, Final Results of Redetermination Pursuant to Panel Remand Order, April 30, 2024 (Redetermination I or First Redetermination).

[4] *Softwood Lumber Products from Canada: Final Affirmative Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances,* Secretariat File No. USA-CDA-2017-1904-03, Order, July 1, 2024.

equal size.[5] The decision of the Court of Appeals in *Stupp* also in April 2025 followed the ruling in *Marmen III* and ordered a remand to Commerce.[6]

On February 19, 2026, the Panel issued its Decision on First Remand.[7] The Panel affirmed Commerce's Redetermination on two of the outstanding matters and remanded to Commerce the re-calculation of dumping margins without using the Cohen's *d* test in accordance with *Marmen III.* In this remand, the Panel permitted Commerce to re-perform a differential pricing analysis under 19 U.S.C. 1677f-1(d)(1)(B), and required that if it chose to do so, Commerce must explain, pursuant to 19 U.S.C. 1677f-1(d)(1)(B)(ii), why the determination of a "pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time" cannot be taken into account using a method (A-A or T-T) outlined in 19 U.S.C. 1677(d)(1)(A)(i) or (ii).[8] Thus, in accordance with *Marmen III*, the Panel remanded the Redetermination to Commerce to explain in full, and in light of the statute's requirements, which methodology it chooses to make a determination of less than fair value.[9]

On April 30, 2026, Commerce filed its Final Results of Redetermination pursuant to the Panel's Order.[10] In the Second Redetermination, Commerce noted that it "discontinued its use of the Cohen's *d* test in administrative proceedings and adopted a new test for evaluating whether price differences among purchasers, regions, or time periods are significant."[11] Commerce also

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[5] *Marmen Inc. v. United States*, No. 2023-1877, 134 F.4th 1334 (Fed. Cir. 2025) (*Marmen III*).
[6] *Stupp Corp. v. United States*, No. 2023-1663, (Fed. Cir. 2025) (non-precedential).
[7] NAFTA Panel Report, *Certain Softwood Lumber Products from Canada: Final Affirmative Determination of Sales at Less Than Fair Value*, Decision of the Panel on First Remand, Secretariat File No. USA-CDA-2017-1904-03, Order, February 19, 2026
[8] *Id*. at 28.
[9] *Id*. at 30.
[10] *Certain Softwood Lumber Products from Canada: Final Affirmative Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances*, *Final Results of Redetermination Pursuant to Panel Remand Order*, Secretariat File No. USA-CDA-2017-1904-03, Order, April 30, 2026 (Redetermination II or Second Redetermination).
[11] *Id*. at 4

discontinued use of the "mixed comparison method"[12] in the ratio test. The new differential pricing analysis utilizes three steps: the new price difference test, the modified ratio test, and the meaningful difference test.

On July 27, 2026, the Panel ordered an extension of the deadline for issuance of its decision to October 27, 2026. On October 27, 2026, the Panel ordered a further extension to November 6, 2026.

The Department of Commerce filed Notices of Subsequent Authorities on August 5, August 21 and September 25, 2026. On August 10, August 26 and September 30, 2026, the GOC and Resolute filed the Canadian Parties' Responses. The COALITION filed Responses on the same dates.

II. STANDARD OF REVIEW

This Panel's authority derives from Chapter 19 of the NAFTA. Article 1904(1) of the NAFTA provides that "each Party shall replace judicial review of final antidumping and countervailing duty determinations with binational panel review." Article 1904(2) directs the Panel to assess whether a final countervailing duty or antidumping duty determination is in accordance with the laws of the importing country, in this case, the United States. The laws consist of the "relevant statutes, legislative history, regulations, administrative practice and judicial precedents to the extent that a court of the importing Party would rely on such materials in reviewing a final determination of the competent investigating authority."[13] Decisions of the Court of International Trade are not binding on the Panel, although they may be persuasive

[12] *Id*.
[13] NAFTA, Chapter 19, Articles 1904(2) and (3).

authority.[14] Decisions of the Supreme Court of the United States and of the U.S. Court of Appeals for the Federal Circuit have binding effect.[15]

Pursuant to Article 1904(3) and Annex 1911 of the NAFTA, the Panel is required to apply the standard of review specified in Section 516A(b)(1)(B) of the Tariff Act of 1930 ("the Act").[16] That section states that "[t]he Court shall hold unlawful any determination, finding, or conclusion, found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." Under this standard, the Panel does not engage in *de novo* review and must restrict its review to the administrative record. "In short, we do not make the determination; we merely vet the determination."[17]

"Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[18] Like a reviewing court, this Panel must consider the record as a whole, including evidence that fairly detracts from the weight of the evidence in support of the agency's determination.[19] However, the substantial evidence standard is a high barrier to meet, requiring that no reasonable fact finder could reach the same conclusion."[20]

For several decades, U.S. courts afforded substantial deference to federal agency decisions interpreting ambiguous federal statutes under the "*Chevron* doctrine".[21] In *Loper Bright*

[14] *See* Commerce, Rule 57(2) Brief, August 6, 2018 at 10, citing *Algoma Steel Corp. v. United States*. 865 F.2d 240, 243 (Fed. Cir. 1989)
[15] *Id*., citing *Strickland v. United States*, 423 F.3d 1335, 1338 n.3 (Fed. Cir. 2005) (citing *Crowley v. United States*, 398 F.3d 1329, 1335 (Fed. Cir. 2005).
[16] 19 U.S.C. § 1516a(b)(1)(B).
[17] *Nippon Steel Corp. v. United States*, 458 F.3d 1345, 1352 (Fed. Cir. 2006).
[18] *Consolidated Edison Co. v. National Labor Relations Bd.,* 305 U.S. 197, 229 (1938).
[19] *Nippon Steel*, 458 F.3d at 1351.
[20] *INS v. Elias-Zacharias,* 502 U.S. 478, 483-84 (1992).
[21] *Chevron U.S.A. Inc. v. Natural Resources Defense Council,* 467 U.S. 837 (1984).

Enterprises v. Raimondo,[22] the U.S. Supreme Court overruled its former approach.[23] The Court determined that the deference owed by a reviewing court to agency action under the *Chevron* doctrine is inconsistent with the courts' proper role in statutory interpretation and the Administrative Procedure Act (APA).[24] Instead, courts should "use every tool at their disposal to determine the best reading of the statute and resolve the ambiguity."[25]

The Court recognized that Executive Branch interpretations of statutes are entitled to respect, especially when the interpretation is issued contemporaneously with enactment of the statute and remained consistent over time.[26] It further recognized that the interpretations and opinions of an agency based on its specialized expertise could provide guidance to a reviewing court even on legal questions.[27] However, the agency's reading is not controlling, though the court may still find its reasoning useful.[28] The weight given an agency's judgment in any particular case depends on "the thoroughness evident in its consideration, the validity of its reasoning, the consistency with earlier and later pronouncements, and all other factors giving it power to persuade."[29] But the judiciary must exercise its independent judgment, particularly with respect to questions of law.[30]

Some statutes may expressly delegate to an agency the authority to give meaning to a particular statutory term.[31] Other statutes may empower the agency to fill in the details of a

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[22] 603 U.S. 369, 412 (2024).
[23] *Id*.
[24] *Id,* at 404-406.
[25] *Id*. at 400.
[26] *Id.* at 385-86.
[27] *Id*. at 388, citing *Skidmore v. Swift & Co*., 323 U.S. 134, 139-40 (1944).
[28] *See, e.g., Ventura Coastal, LLC v. United States*, 736 F. Supp. 3d 1342 (Ct. Int'l Trade 2024) (defining the meaning of "partners" in 19 U.S.C. § 1677(33)(C) without deferring to Commerce).
[29] *Skidmore*, 323 U.S. at 140.
[30] *Loper-Bright*, 603 U.S. at 392.
[31] *Id*, at 394. *See, e.g., Hanon Systems Alabama Corp. v. United States*, 794 F. Supp. 3d 1348, 1356 (Ct. Int'l Trade 2025) (concluding open-ended circumvention language gives Commerce a range of case-specific choices).

statutory scheme or "to regulate subject to limits imposed by a term or phrase."[32] The *Loper-Bright* Court further stated that, "When the best reading of the statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. . .The Court fulfils that role by recognizing constitutional delegations, fix[ing] the boundaries of [the] delegated authority . . . and ensuring the agency has engaged in 'reasoned decisionmaking' within those boundaries."[33] The Federal Circuit Court of Appeals has affirmed post-*Loper-Bright* that "when an agency exercises discretion granted by a statute, judicial review is typically conducted under the Administrative Procedure Act's deferential arbitrary-and- capricious standard."[34] The Federal Circuit further stated that, "Under that standard, a court asks not whether it agrees with the agency decision, but rather only whether the agency action was reasonable and reasonably explained."[35]

By contrast, agency decisions with respect to questions of fact based on an agency's specialized expertise are entitled to more deference.[36] This judicial deference to an agency's factfinding is codified in the Administrative Procedure Act (APA)[37] and reaffirmed in *Loper-Bright*.[38]

Applying *Loper-Bright's* guidance to the current dispute, the Panel asks whether Commerce's factual determinations are "unsupported by substantial evidence on the record" as directed by the statute. However, when determining whether Commerce's decision is "otherwise

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[32] *Loper Bright*, 603 U.S. at 395.
[33] *Id*.
[34] *Mosaic Co. v. United States*, 160 F.4th 1340, 1346 (Fed. Cir. 2025) (*Mosaic*) (quoting *Seven Cnty. Infrastructure Coal. v. Eagle Cnty., CO*, 605 U.S. 168, 179–80 (2025)).
[35] *Seven Cnty. Infrastructure Coal,* 605 U.S. at 180. *See also Stupp Corp. v. United States*, 5 F.4th 1341, 1353 (Fed. Cir. 2021) (*Stupp I*) (a reasonableness standard governs Commerce's selection of statistical tests and numerical cutoffs); *Marmen, Inc. v. United States*, 134 F.4th at 1344, 1345 (Fed. Cir. 2025) (*Marmen III*) (Circuit Court reviewed Commerce's use of Cohen's *d* test under a reasonableness standard).
[36] *See Skidmore*, 323 U.S. at 134.
[37] 5 U.S.C. § 706(2)(A) & (C).
[38] *Loper-Bright*, 603 U.S. at 388.

not in accordance with law", the Panel employs its independent judgment and all the traditional tools of statutory construction to determine the best reading of the statute. In doing so, the Panel considers whether the relevant statutory provision expressly delegates to Commerce the authority to give meaning to a particular statutory term, or empowers Commerce to fill in the details of the statutory scheme, or to regulate subject to limits imposed by a term or phrase.

III. STATUTORY AUTHORITY AND APPLICATION

The Panel is reviewing the methodology used by Commerce to determine whether the merchandise that is the subject of the investigation has been sold at less than fair value. The text of 19 U.S.C. 1677f-1(d) provides:

> (d) Determination of less than fair value
>
> (1) Investigations
>
> (A) In general
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> In an investigation under part II of this subtitle, the administering authority shall determine whether the subject merchandise is being sold in the United States at less than fair value—
>
> (i) by comparing the weighted average of the normal values to the weighted average of the export prices (and constructed export prices) for comparable merchandise, or
>
> (ii) by comparing the normal values of individual transactions to the export prices (or constructed export prices) of individual transactions for comparable merchandise.
>
> (B) Exception
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> The administering authority may determine whether the subject merchandise is being sold in the United States at less than fair value by comparing the weighted average of the normal values to the export prices (or constructed export prices) of individual transactions for comparable merchandise, if—
>
> (i) there is a pattern of export prices (or constructed export prices) for comparable merchandise that differ significantly among purchasers, regions, or periods of time, and
>
> (ii) the administering authority explains why such differences cannot be taken into account using a method described in paragraph (1)(A)(i) or (ii).

As set out in 19 U.S.C. 1677f-1(d), the DOC identifies dumping by comparing normal values to export prices or constructed export prices for the product in question. The primary approach is to compare weighted averages (A-to-A method) or individual transactions (T-to-T method). As an exception, the DOC may compare weighted average normal values to individual export prices (A-to-T method) if there is a pattern of export prices that differ significantly among purchasers, regions, or periods of time, and if the DOC explains why it cannot take account of such differences under the A-to-A method or the T-to-T method. In comparisons using the A-to-T method, the DOC sets margins to zero whenever the export price is above the average normal value, so that higher prices do not offset lower ones. Commerce does not use zeroing for the A-to-A method or the T-to-T method.

To apply paragraph 19 U.S.C. 1677f-1(d)(1)(B), Commerce uses a three-step analysis to identify significant differences among an exporter's prices to purchasers, regions or time periods, to determine whether there is a pattern of such differences, and to explain why those differences cannot be taken into account under the A-to-A method or the T-to-T method. In the initial Determination and Redetermination I, Commerce used the Cohen's *d* test in the first step to identify significant differences in export prices among purchasers, regions and time periods. In the second step, to determine whether there was a pattern of such differences, Commerce used a mixed ratio test. Under that test, if 66% or more of an exporter's sales by value passed Cohen's *d*, Commerce would consider applying the A-to-T method to all sales in the period of investigation (POI). If more than 33% but less than 66% passed, Commerce would consider applying the A-to-T method for sales that passed and another method, normally the A-to-A method, for the remaining sales. If 33% or fewer of the sales passed, Commerce would conclude that there was no pattern.

In the third step, Commerce used the meaningful difference test to explain why significant differences could not be taken into account using the A-to-A method or the T-to-T method. Under that test, Commerce would run the A-to-T calculation and compare the result to the exporter's margin produced using another method, normally the A-to-A method. If the result of a calculation using the A-to-T method differed from the margin determined under the A-to-A method by 25% where both rates were above the *de minimis* threshold or if the comparison between the two rates crossed the *de minimis* threshold, Commerce would conclude that the A-to-T method made a meaningful difference.

After public consultation on alternatives to the use of the Cohen's *d* test, Commerce adopted revised methodology for the application of paragraph 19 U.S.C. 1677f-1(d)(1)(B).[39] In the revised approach, export prices that differ significantly are identified through the "price difference test." Commerce describes the test as follows:

> "For comparable merchandise, the price difference test examines whether the weighted-average net price to a given purchaser, region or time period is within two percent of the weighted-average net price to all other purchasers, regions, or time periods. If the weighted-average net price to the given purchaser, region, or time period falls outside of the plus or minus two percent band around the weighted-average net price to all other purchasers, regions, or time periods, then the prices to that given purchaser, region, or time period are found to differ significantly and those sales to the given purchaser, region, or time period pass the price difference test."[40]

The revised approach also abandons the mixed method and the 66% mark in the ratio test. The new approach finds that a pattern exists if more than 33% of sales by value pass the price difference test. There is no change in the meaningful difference test. If the result of a calculation using the A-to-T method differs from the margin determined under the A-to-A method by 25% where both rates are above the *de minimis* threshold or if the comparison between the two rates crosses the *de*

[39] *Heavy Walled Rectangular Welded Carbon Steel Pipes and Tubes from the Republic of Korea*: *Final Results of Antidumping Duty Administrative Review; 2022-2023*, 90 FR 30050 (July 8, 2025) and accompanying IDM.
[40] Second Redetermination at 6.

minimis threshold, then Commerce concludes that the A-to-T calculation makes a meaningful difference.[41]

IV. COMMERCE'S SECOND REDETERMINATION

In accordance with *Marmen III* and the Panel's Decision on First Remand,[42] Commerce reconsidered its use of the Cohen's *d* test and replaced it with the new price difference test for identification of export prices that differ significantly. In the recalculation, Commerce used the modified ratio test. For the mandatory respondents, Commerce found that the percentages of U.S. sales by value passing the price difference test were as follows: Canfor 99.08 percent, Tolko 98.24 percent, West Fraser 97.85 percent and Resolute 98.37 percent.

Pursuant to the meaningful difference test, Commerce compared the margins produced under the A-to-A method of calculation and the A-to-T method of calculation. For Canfor, as there was no meaningful difference between the two, Commerce used the A-to-A method of calculation. For Tolko and West Fraser, as the A-to-T calculations produced a 25 percent relative change, Commerce applied the A-to-T method of calculation. For Resolute, as the comparison between the A-to-T calculation and the A-to A calculation crossed the *de minimis* threshold, Commerce applied the A-to-T method of calculation.[43] In the result, there was no change in antidumping margins from those found in Commerce's Redetermination I of April 30, 2024: Canfor 6.63 percent, Tolko 7.14 percent, West Fraser 5.18 percent, Resolute 3.08 percent, all other producers and exporters 5.66 percent.[44]

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[41] Second Redetermination at 2-7. *See* Commerce, Rule 57(2) Brief, August 6, 2018 at 49-56.
[42] NAFTA Panel Report, *Certain Softwood Lumber Products from Canada, Final Affirmative Determination of Sales at Less Than Fair Value*, Secretariat file No USA-CDA-2017-1904-03, Decision of the Panel on First Remand, February 19, 2026.
[43] Second Redetermination at 8-9.
[44] *Id*. at 2. *See* Redetermination I at 168-169.

V. PANEL'S ANALYSIS

Standard of Review

Commerce contends that *Loper Bright* did not abolish all forms of deference to agency interpretations of questions of law. The best reading of legislation may indicate that discretionary authority is delegated to an agency, in which case the agency must engage in decision making that is "logical and rational."[45] Commerce argues that discretion can be delegated by using general language, such as "significant", "appropriate" or "comparable."[46] Commerce notes that Federal Circuit precedent has recognized deference to Commerce's economic and accounting expertise in interpretation of the antidumping statute, distinct from previous *Chevron* deference.[47] Commerce argues that the Court of Appeals for the Federal Circuit (CAFC) continued to apply the reasonableness standard after *Loper Bright* when the statute delegates discretion to the agency and when the CAFC was well aware of the Supreme Court's decision in *Loper Bright*.[48]

The GOC argues that Commerce's revised differential pricing analysis is subject to the new standard of review in *Loper Bright*. The GOC concludes that the Panel must reach its own best reading of the legislation, even if statutory language is ambiguous and Commerce has relied on a reasonable interpretation. Although decisions finding "specific agency actions" lawful under the *Chevron* standard may remain binding,[49] the GOC argues that previous decisions on Commerce's

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[45] *Allentown Mack Sales & Serv. v. NLRB*, 552 U.S. 359, 374 (1998).
[46] *Bio-Lab, Inc. v United States*, 776 F. Supp. 3d 1315, 1329 (Ct. Int'l Trade, 2025), citing *Ventura Coastal LLC v. United States*, 736 F. Supp. 3d 1342, 1356 (Ct. Int'l Trade, 2024); *Hanon Sys, Ala, Corp. v. United States*, Ct. No. 24-00013, Slip Op. 25-94, 2025 Ct. Intl. Trade LEXIS 96 at *14 h at 1345(Ct. Intl Trade, 2025).
[47] Commerce Rule 73(2)(c) Brief at 8, citing *Fujitsu General Ltd. v. United States*, 88 F.3d 1034, 1039 (Fed. Cir. 1996). *See*: *Nexteel Co. v. United States*, 28 F.4th 1226, 1239 (Fed. Cir. 2022); *Borusan Mannesmann Sanayi Ve Ticaret A.S. v. Am. Cast Iron Pipe Co.*5 F.4th 1367, 1374-75 (Fed. Cir. 2021).
[48] *Id.* at 17-18. *See*: *Marmen III, 134 F.4th* at 1345; *Adee Honey Farms v. United States*, 107 F.4th 1322, 1331 (Fed. Cir. 2024); *Softview LLC. v. Apple Inc.*, 108 F.4th 1366, 1372 & n.2 (Fed. Cir. 2024); *Darby Dev. Co. v. United States*, 112 F.4th 1017, 1048 & n.10 (Fed. Cir. 2024).
[49] GOC Rule 73(2)(b) Brief at 8, citing *Loper Bright*, 603 U.S. at 411. The GOC contends that previous decisions "*may* have persuasive value," if their reasoning applies beyond *Chevron* analysis. *Id*. at 9 (emphasis in original).

differential pricing analysis do not involve the same "specific agency action" as in the Second Redetermination because two of the three tests have changed.[50] The GOC argues that the statutory reference to prices that differ "significantly" is not open-ended and does not delegate particular discretion to Commerce, since "significantly" has "quantitative and qualitative elements"[51] and does not match the subjectivity of words such as "appropriate" or "reasonable," terms listed by the U.S. Supreme Court in *Loper Bright* as indicating flexibility for agencies.[52] Resolute notes that the mention of reasonableness as a legal standard in *Marmen* does not take precedence over the U.S. Supreme Court decision in *Loper Bright*.

The COALITION states that reasonableness review was applied by the Federal Circuit in *Marmen* after the *Loper Bright* decision, as well as by the Court of International Trade (CIT) in several recent decisions. The COALITION argues that deference to Commerce can also be found in implied delegation by Congress through the use of open-ended terms that are not ambiguous, but rather call for discretionary decisions, such as "reasonable, appropriate, feasible and practicable." The CIT has found that "differ significantly" is such a term.[53] The COALITION submits that Commerce's explanation is reasonable and it is logical that a 2 percent difference could mask dumping and harm the domestic industry.[54]

The Panel recalls that the CAFC in *Marmen III* stated that Commerce was not precluded from using statistical tests in its revised differential pricing mechanism "as long as the resulting

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[50] *Id*. at 9, citing *Marmen III, 134 F.4th* at 1346 ("If the output of Cohen's *d* test is incorrect, then the flawed output becomes a flawed input to the ratio test. That flawed input to the ratio test leads to a flawed output and that flawed output will be used to determine whether a pattern of significant price differences exists … We decline to conclude that a flawed output in step one of a calculation can be transformed into meaningful data by further manipulating it.")
[51] *Id*. at 13.
[52] *Loper Bright*, 603 U.S. at 395.
[53] COALITION Rule 73(2)(c) Brief at 13-14, citing *Garg Tube Export LLP v. United States*, 740 F. Supp. 3d 1355 (Ct. Int'l Trade 2024).
[54] *Id*. at 22-24.

analysis is itself justified as sound for gauging differences in the data sets at issue."[55] Commerce has chosen not to adopt a doctrine or theory such as Cohen's *d* from statistics in the revised mechanism.

The GOC contends that "significant" does not imply a delegation of discretion, in contrast to the words "appropriate" or "reasonable" that are cited by the Supreme Court in *Loper Bright* as indications of agency discretion. In opposition, the COALITION argues that Commerce has appropriately interpreted the open-ended phrase "differ significantly" as an exercise of its implicit delegated discretion under the statute.[56]

The Panel also recalls that the CAFC has required that Commerce's use of statistical tests and numerical cutoffs must be reasonable.[57] Commerce noted that the CIT has recently approved Commerce's revised differential pricing analysis as reasonable in several decisions.[58]

We note further that Commerce has expertise in economic and accounting matters as applied in antidumping matters[59] and that the U.S. Supreme Court in *Loper Bright* recognized that agency interpretations can provide guidance to reviewing courts based on specialized expertise.[60]

By a majority, the Panel finds that a standard of reasonableness applies to Commerce's differential pricing analysis both because the statutory phrase "differs significantly" implies a

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[55] *Marmen III* at 1348.
[56] COALITION Rule 73(2)(c) Brief at 18-19.
[57] *Stupp Corp. v. United States*, 5 F.4th 1341 at 1353 (Fed. Cir. 2021) (*Stupp I*).
[58] *Toyo Kohan Co., Ltd. v. United States*, No. 24-00261 (Ct. Int'l Trade May 22, 2026) (*Toyo Kohan*); *Marmen Inc. v. United States*, No. 20-00169 (Ct. Int'l Trade June 15, 2026) (*Marmen IV)*; *Government of Canada v. United States*, No. 23-00187 (Ct. Int'l Trade July 27, 2026) (*Gov't of Canada)*; *Universal Tube and Plastics Indus. Ltd. v. United States,* No. 23-00113 (Ct. Int'l Trade Aug.19, 2026) (*Universal Tube*); *Maquilacero S.A. de C.V. v. United States*, No. 23-00091 (Ct. Int'l Trade Sept.14, 2026) (M*aquilacero*); *Stupp Corp. et al., v. United States*, No. 15-00334 (Ct. Int'l Trade Sept. 15, 2026) (*Stupp II*). We note that these cases were decided by three judges, one judge having been assigned four of the cases.
[59] *Fujitsu General Ltd. v. United States*, 88 F.3d 1034 at 1039 (Fed. Cir. 1996)
[60] *Loper Bright*, 603 U.S. at 388, citing *Skidmore v. Swift & Co.,* 323 U.S. 134 at 139-140 (such "interpretations and opinions" … "constitute[d] a body of experience and informed judgment to which courts and litigants [could] properly resort for guidance.")

measure of agency discretion and because Commerce's expertise in economic and statistical matters is entitled to a certain amount of deference.

Price Difference Test

Two Percent Test

In the Second Redetermination, Commerce supported its choice of the 2 percent price difference test to identify export prices that differ significantly. In response to submissions from the GOC and Resolute, Commerce maintained that the test is reasonable, as a 2 percent threshold is used in the arm's-length test for affiliated party sales and is also the *de minimis* standard in dumping investigations. Commerce responded to GOC submissions that the 2 percent test was illogical when prices within a control group of purchasers, regions or time periods also differed by more than the test margins and that market volatility must be taken into account. In reply, Commerce argued that the Federal Circuit has held that Commerce is not required to determine an exporter's intent or to consider factors other than potential targeted or masked dumping as explanations for price differences.[61]

Resolute submits that the number "2" is "not inherently … large, important, noticeable or significant"[62] and Commerce's references to other 2 percent tests are not persuasive for use in differential pricing analysis. The GOC submits that Congress intended the identification of price differences to proceed case-by-case "because small differences may be significant for one industry or one type of product, but not for another."[63] Using the same percentage test for every industry and product violates this intent, according to the GOC.

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[61] Second Redetermination at 16, citing *JBF RAK v United States*, 790 F. 3d 1358, 1368 (Fed. Cir. 2015) (*JBF RAK*); see also *Borusan Mannesmann Boru Sanayi Ve Ticaret A. S. v. United States*, 608 Fed. Appx. 948, 949 (Fed. Cir 2015) (non-precedential); and *Nan Ya Plastics Corp., Ltd. v. United States*, 128 F. Supp. 3d 1345 (CIT 2015).
[62] Resolute Rule 73(2)(b) Brief at 10-16..
[63] GOC Rule 73(2)(b) Brief at 15, quoting Statement of Administrative Action accompanying the Uruguay Round Agreements Act, H.R. Doc. No. 103-316 (1994) (SAA) at 843.

Commerce rejected criticisms that the price difference test fails to operate on a case-by-case basis and that it produces abnormally high results. Commerce maintained that the price difference test does not ignore the direction to proceed on a case-by-case basis, since the relevant data sets change with each case and the test measures a relative difference expressed as a percentage, not an absolute value.[64] As well, Commerce argued that while the test often produces a finding of prices that differ significantly, the analysis operates on a case-by-case basis.

If this Panel were writing on a clean slate, it might choose a test that is different from the two percent test chosen by Commerce. However, the role of the Panel is not to substitute its judgment for Commerce, but to determine whether Commerce acted reasonably. By a majority, we find that the two percent test meets the standard of reasonableness.

Change in policy

In the Second Redetermination, Commerce responded to an argument that it was changing policy without explanation as it had previously rejected using a 2 percent test for targeted dumping. Commerce noted that the earlier files dealt with petitioners' specific allegations about low-priced sales and, with experience, Commerce has now developed the differential pricing analysis.

Commerce maintained that the price difference test was not the same as the P/2 test rejected by the DOC earlier when it developed and adopted the *Nails* test.[65] The P/2 test considered whether averaged US prices in allegedly targeted sales were 2 percent lower than the averaged US prices for other sales. The test was found unable to identify targeted dumping. Commerce argues that the P/2 test is not relevant to the current price difference test which examines whether US prices differ among purchasers, regions or time periods. The P/2 test considered whether allegedly targeted

[64] Second Redetermination at 18-19.
[65] *Certain Steel Nails from the People's Republic of China: Final Determination of Sales at Less Than Fair Value and Partial Affirmative Determination of Critical Circumstances*, 73 FR 33977 (June 16, 2008) and accompanying IDM.

sales were 2 percent lower than other sales. In contrast, the current price difference test examines whether prices are 2 percent higher or lower than prices for sales in the comparison groups.[66]

By a majority, we find that Commerce has adequately explained the change in policy.

Substantial evidence

Although Commerce invited comments on the price difference test, Resolute states that there was no response beyond a mere acknowledgement for Resolute's suggested alternate test using standard deviations.[67] Resolute argues that this disregard of material evidence was arbitrary and capricious and that the Second Redetermination is therefore unsupported by substantial evidence.[68] Commerce argues that since the price difference test is reasonable, it does not need to consider other proposed alternatives, whether or not those alternatives may also be reasonable.[69] By a majority, we agree that Commerce's decision must be supported by substantial evidence but find no breach of that standard on this issue.

By a majority, we affirm Commerce's use of the price difference test.

Ratio Test

When Commerce reconsidered its use of the Cohen's *d* test and replaced it with the price difference test for identification of export prices that differ significantly, Commerce also modified the ratio test. Previously, if 66% or more of an exporter's sales by value passed the Cohen's *d* test, Commerce would consider applying the A-to-T method to all sales. If more than 33% but less than 66% passed, Commerce would consider applying the A-to-T method to sales that passed and the A-to-A method to the remaining sales. If 33% or fewer of the sales passed, Commerce would conclude there was no pattern.

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[66] Second Redetermination at 19-20, 22-26.
[67] Resolute Rule 73(2)(b) Brief at 19-20.
[68] *Id.* at 20-21.
[69] Commerce Rule 73(2)(c) Brief at 31-32. *See further id.* at 32 (protected).

The revised approach omits the 66% threshold. In the revised ratio test, if more than 33 percent of sales by value pass the price difference test, Commerce will find that there is a pattern of prices that differ significantly and will consider applying the A-to-T method to all sales. If 33% or fewer pass, Commerce will conclude that there is no pattern.

The GOC argues that Commerce fails to explain the change in approach, which reduces the use of A-to-A valuation for those exporters whose results fall in the middle range between 33% and 66% under the price difference test. In addition, the GOC submits that the *Stupp* decision, which approved the earlier version of the ratio test, does not have binding effect in the current review as the case dealt with the Cohen's *d* test and the unrevised mixed method ratio test.[70]

In response, Commerce argues that the mixed method is not explicitly mentioned in the statute and that the change enhances Commerce's ability to remedy masked dumping, in line with legislative purpose.[71] In addition, Commerce objects that the GOC lacks standing to challenge the revised ratio test, as all of the mandatory respondents have percentages of sales passing the price difference test that are well over 66%. Since none would have qualified for the middle range treatment in the mixed ratio test, none have suffered actual injury flowing from the revision.[72]

The Panel determines that the GOC has standing to present this argument. The mandatory respondents contest the price difference test and are thus entitled to present argument on the related ratio test. As well, governments speak on behalf of their entire populations. The GOC also speaks for other exporters who would be subject to the "all others" rate, and thus has standing on their behalf.

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[70] GOC Rule 73(2)(b) Brief at 28-35. See *Stupp Corp. v. United States*, 5 F.4th 1341 at 1355 (Fed. Cir. 2021) ("Commerce's approach ... provid[es] a middle ground between 33% and 66%, in which the average-to-transaction method is only partially applied. That approach provides a better fit, minimizing both the assessment of anti-dumping duties that are too high and the assessment of duties that are too low. We conclude that Commerce's cutoffs are reasonable in light of the alternatives.")

[71] Commerce Rule 73(2)(c) Brief at 41-44.

[72] *Id.* at 40-41.

In response to the submission that it must explain why it abandoned the mixed ratio test, reducing the application of the A-to-A method, Commerce argues that the revised test is better able to address masked dumping, in accordance with the statutory objective.[73] Commerce maintains that it has discretion to determine a reasonable methodology to implement the statutory mandate and that aggregation of prices among purchasers, regions and time periods has been approved in Federal Circuit precedent.[74]

Commerce submits that the requirement of a "pattern" in 19 U.S.C. 1677f-1(d)(1)(B) is met by a "frequent and widespread incidence"[75] and that the pattern need not lead to an inference of dumping,[76] such as by linking high prices to low prices. Commerce maintains that it has flexibility and discretion to develop methodologies to carry out its assigned tasks using its technical expertise in economic and accounting matters, for which it benefits from deference that is separate and distinct from the previous *Chevron* deference.[77] The Panel notes that *Loper Bright* recognized that agency interpretations can provide guidance to reviewing courts based on specialized expertise.[78]

By a majority, the Panel affirms Commerce's use of the revised ratio test as a reasonable interpretation of the statute in light of the appropriate deference due an expert agency in economic and statistical matters and in choosing numerical cutoffs.

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[73] *Second Redetermination* at 33-35.
[74] *Id*. at 32-33, citing *Stupp I*
[75] Commerce Rule 73(2)(c) Brief at 37.
[76] *Id.*
[77] *Id.* at 8, citing *Fujitsu General Ltd. v. United States*, 88 F.3d 1034, 1039 (Fed. Cir. 1996). *See*: *Nexteel Co. v. United States*, 28 F.4th 1226, 1239 (Fed. Cir. 2022); *Borusan Mannesmann Sanayi Ve Ticaret A.S. v. Am. Cast Iron Pipe Co.*5 F.4th 1367, 1374-75 (Fed. Cir. 2021). *See Id.* at 18-19.
[78] *Loper Bright*, 603 U.S. at 388.

Meaningful Difference Test

The meaningful difference test is the last step in the differential pricing analysis. Once Commerce has applied the price difference test and has found that more than 33 percent of the exporter's total sales by value pass that test, it concludes that there is a pattern of prices that differ significantly. Commerce then examines whether the A-to-A method can account for such differences. Weighted-average dumping margins are calculated using both the A-to-A method and the A-to-T method. If the difference between the two results is meaningful, Commerce concludes that the A-to-A method is unable to account for the differences in the exporter's pricing. The difference between the dumping margins is considered meaningful if there is a 25 percent change between the rates when both are above the *de minimis* threshold or if the comparison between the two rates crosses the *de minimis* threshold.

In the Second Redetermination, Commerce responded to comments from the GOC and Resolute that the A-to-A method applied on a monthly basis could account for any price differences.[79] Commerce argued that monthly calculations would not prevent the offsetting of lower prices with higher prices within each month or when results are being aggregated, and that only the A-to-T method eliminates offsetting.[80] Commerce stated that the two measurements within the meaningful difference test, the 25% change and the change crossing the *de minimis* threshold, indicate the magnitude of the masked dumping.[81]

The GOC argues that the price difference test as applied to time periods simply shows market variability in U.S. prices, not masked dumping. The GOC submits that neither the ratio test nor the meaningful difference test provides a basis for assumptions about dumping since they

[79] Second Redetermination at 35-36.
[80] *Id*. at 37-40.
[81] *Id*. at 40-41.

involve no comparisons to normal value. The GOC contends that Commerce's comments about offsetting should be rejected as they are simply a challenge to averaging in margin calculations, part of the preferred method of calculation chosen by Congress in the legislation.[82] Resolute states that comparisons made month-by-month could produce both positive and negative dumping margins revealing the situation in each period.[83] If Commerce is concerned about masked dumping within the monthly figures, Resolute submits that Commerce is free to choose a shorter time period or use the T-to-T method for calculation.[84] Resolute submits that comparisons of time periods are uniquely subject to an obligation of "a fair comparison" in 19 U.S.C. § 1677b(a)(1)(A), requiring that normal values "reasonably correspond… to the time of the sale used to determine the export price." Resolute submits that this requirement is reflected in the preferred A-to-A method of comparison.[85] The GOC also argues that the A-to-T methodology "increases the risk of unfair comparisons"[86] in volatile markets when an individual transaction price is measured against an average value for the full period of investigation.

Commerce responds that the statute permits use of the A-to-T method when there is a pattern of prices that differ significantly, in order to reveal masked dumping.[87] As well, Commerce argues that whether the comparisons are for the full POI or for shorter periods of time, the A-to-A method offsets higher and lower prices. Commerce objects to the chart and the information on pages 36-38 of Resolute's brief, which Commerce submits should be excluded based on the

[82] GOC Rule 73(2)(b) Brief at 36-38. Resolute argues that zeroing is similarly a rejection of Congressional intent in favor of averaging as the preferred method of calculation. Resolute Rule 73(2)(b) Brief at 36, note 99. Commerce argues that zeroing is supported by a reading of 19 U.S.C. § 1677(35)(A) and 19 U.S.C. § 1677(35)(B). Commerce, Rule 73(2)(c) Brief at 11, note 7. We note that the issue of zeroing is not before this Panel (Panel Decision and Order, October 5, 2023 at 23-26).
[83] Resolute Rule 73(2)(b) Brief at 33-34.
[84] Resolute Rule 73(2)(b) Brief at 39. Commerce replies that the T-to-T comparison method is only for unusual situations such as cases with a small number of sales. Commerce Rule 73(2)(c) Brief at 52.
[85] Resolute Rule 73(2)(b) Brief at 32-34.
[86] GOC Rule 73(2)(b) Brief at 41.
[87] Commerce Rule 73(2)(c) Brief at 55.

principle of exhaustion, as the material was not presented to Commerce during the remand proceedings.[88]

Commerce states that the Federal Circuit held that the meaningful difference test informed the question of whether the A-to-A method could account for the significant price differences in *Apex II*.[89] Although *Apex II* did not involve the current differential pricing inputs, approval was for the functioning of the test. As well, the Federal Circuit in *Stupp I* held that the meaningful difference test was reasonable and that it satisfied the statutory directive to explain why the A-to-A method was inadequate.[90] In support of Commerce, the COALITION submits that Federal Circuit authority in *Apex II* and *Stupp I* is controlling and confirms that the meaningful difference test is sufficient to satisfy the requirements of 19 U.S.C. § 1677f-1(d)(1)(B)(ii).[91] The COALITION also argues that Commerce has reasonably concluded that the A-to-A method applied on a monthly basis would allow one month's higher prices to offset another month's lower prices and thus cannot account for a pattern of prices that differ significantly.[92]

In support of their arguments that Commerce should have used its discretion to choose a monthly or shorter period for averaging under the A-to-A method, the GOC and Resolute refer to 19 CFR 351.414(d)(3). That Regulation gives Commerce explicit discretion to calculate weighted averages for periods of time shorter than the full period of an investigation if export prices or constructed export prices differ significantly. In its Response to Parties' Comments on Final Results of Second Redetermination, Commerce objected to reliance on 19 CFR 351.414(d)(3), referring to NAFTA Rule 7(a) which limits the Panel to errors of fact and law raised in the

[88] *Id.* at 49-50. The Panel does not rely on this chart or information.
[89] *Apex Frozen Foods Private Ltd. v. United States*, 862 F.3d 1337 at 1346 (Fed. Cir. 2017) (*Apex II*).
[90] *Stupp I*, 5 F.4th at 1356.
[91] COALITION Rule 73(2)(c) Brief at 33.
[92] *Id*. at 37.

Complaints filed.[93] Resolute points to NAFTA Rule 7(b) which adds "procedural and substantive defenses raised in the panel review."[94] In addition to the submissions by Resolute and the GOC on the meaningful difference test in the Second Redetermination, Resolute notes that it had earlier raised the same Regulation in its defense.[95] Commerce correctly states that the Regulation could apply separately from the analysis of differential pricing. However, the mention of export prices that differ significantly directly tracks the language of 19 U.S.C. § 1677f-1(d)(1)(B)(i) and links the Regulation to differential pricing methodology, a matter explicitly included in the Complaints.[96] The Panel determines that argument on the Regulation is within the Panel's jurisdiction.

For analysis of the meaningful difference test, the *Apex II* decision is not solidly on point, as argument was focused on the use of all sales, rather than only those that differ significantly. In addition to heavy reliance on *Chevron*, *Apex II* differed from the facts in this appeal because it involved the mixed method for the ratio test as well as the Cohen's *d* test. The Court did, however, state that "Commerce has explained why a comparison of the ultimate antidumping rates sheds light on whether the A-A methodology can account for price differences—an explanation the CIT found adequate and reasonable, as do we."[97]

In the *Stupp I* decision, the Court of Appeals for the Federal Circuit affirmed Commerce's use of the meaningful difference test, citing *Apex II*. The Court found that the meaningful difference test was "a reasonable response to the statutory directive to explain why the average-to-

[93] Commerce Rule 73(2)(c) Brief at 47.
[94] Resolute Rule 73(2) Brief at 31, note 89.
[95] *See* Resolute, Rule 73(3) Brief on Final Results of Redetermination Pursuant to Binational Panel Order, June 17, 2025 at 12-16.
[96] Commerce Rule 73(2)(c) Brief at 2.
[97] *Apex II,* 862 F. 3d at 1347-48, quoting *Apex Frozen Foods*, 144 F. Supp. 3d at 1333 n.24 ("[T]he meaningful difference between the margins demonstrated that A-A is not equipped to uncover the mandatory respondents' dumping.")

average method is inadequate in certain circumstances,"[98] and further stated that "the meaningful difference test is sufficient to satisfy that directive."[99] As in *Apex II*, the facts differed from those at issue in this appeal. The mixed ratio test applied and the Court remanded on use of the Cohen's *d* test. However, the approval of Commerce's methodology for compliance with 19 U.S.C. § 1677f-1(d)(1)(B)(ii) was unequivocal.

The A-to-A method uses averaging for both export prices and normal values which involves offsetting. Commerce and the COALITION are correct that shorter averaging periods will not reveal all targeted or hidden dumping, but it does not follow that the A-to-A method cannot be applied under 19 U.S.C. 1677f-1(d)(1)(B). The meaningful difference test assumes that there will be a difference between the rates determined under the A-to-A method and the A-to-T method. It is only when the difference is greater than the 25% tolerance level that it becomes meaningful, at least when both values are above *de minimis*. Only a meaningful difference indicates that the A-to-A method will be rejected under Commerce's current test.[100]

The statute establishes an approach to deal with the risk of masked dumping. The CAFC has confirmed that Commerce's meaningful difference test meets the requirements of 19 U.S.C. § 1677f-1(d)(1)(B)(ii). Commerce maintains that it has flexibility and discretion to develop methodologies to carry out its assigned tasks using its technical expertise in economic and accounting matters, for which it benefits from deference that is separate and distinct from the

[98] ,*Stupp I*, 5 F.4th at 1356 (Fed. Cir. 2021) .
[99] *Id.*
[100] The use of the *de minimis* threshold is somewhat incongruous as part of the meaningful difference test, since even a tiny change that crosses that low threshold counts as "meaningful." This detail was not argued in the pleadings, however, and prior jurisprudence has applied this part of the test without additional relevant discussion. *Apex II* 862 F.3d at 1343. The issue is not pursued here.

previous *Chevron* deference.[101] The U.S. Supreme Court in *Loper Bright* recognized that agency interpretations can provide guidance to reviewing courts based on specialized expertise.[102]

While not bound by decisions of the CIT, the Panel also takes note of several recent decisions by the CIT upholding Commerce's new test.[103] Those decisions also confirm that the CAFC's prior decisions, which are binding authority for this Panel, have approved the meaningful difference test.

Accordingly, by a majority, the Panel affirms Commerce's use of the meaningful difference test.

VI. ORDER OF THE PANEL

For the reasons set out above, the Panel **AFFIRMS** Commerce's Final Results of Redetermination on differential pricing. The Panel directs the Secretariat to issue a Notice of Final Panel Action.

VII. DISSENTING OPINIONS

Partial Dissent, Panelist Irish

This is a partial dissent, applying to the price difference test and the implementation of the ratio test.

The GOC and Resolute submit that Commerce's new differential pricing methodology produces extremely high pass rates. Among the 200 preliminary and final results issued by

[101] Commerce Rule 73(2)(c) Brief at 8, citing *Fujitsu General Ltd. v. United States*, 88 F.3d 1034, 1039 (Fed. Cir. 1996). *See*: *Nexteel Co. v. United States*, 28 F.4th 1226, 1239 (Fed. Cir. 2022); *Borusan Mannesmann Sanayi Ve Ticaret A.S. v. Am. Cast Iron Pipe Co.*5 F.4th 1367, 1q374-75 (Fed. Cir. 2021). See *id.* at 18-19.
[102] *Loper Bright*, 603 U.S. at 388.
[103] See Footnote 58,

Commerce from July 2025 to April 2026, the GOC states that 88.5% showed pass rates higher than 33 percent and 53% showed pass rates higher than 90 percent.[104] The GOC argues that "[u]nder the price difference test, the statutory term 'differ significantly' loses its meaning."[105]

Resolute argues that the price difference test produces the "absurd result" of significant price differences in almost all cases.[106] According to Resolute, a finding of significant price differences for "nearly 90 percent of U.S. sales … functions as a way of ensuring that virtually all export prices will be considered significantly different, if not unique, from each other."[107] Resolute contends that the price difference test is arbitrary and contrary to Congressional intent, as Commerce fails to follow the direction to use a case-by-case approach and ignores industry-specific and product-specific factors such as volatility in the softwood lumber market.

Commerce contends that the price difference test produces "red flags" that could indicate opportunities for masked dumping.[108] Commerce cites the Federal Circuit decision in *JBF RAK* for confirmation that there is no requirement to find an intent of targeted dumping.[109] Resolute submits that it is not arguing that Commerce must prove intent to dump, rather that Commerce must consider the context of the marketplace when deciding on significance. Commerce replies that it is not required to identify the cause of observed dumping, whether based on intent or other factors. Further, Commerce notes that in several recent decisions, the Court of International Trade upheld the price difference test as reasonably conforming to the statutory requirements.[110]

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[104] GOC Rule 73(2)(b) Brief at 21 note 76; *See Id*. Attachment 1.
[105] *Id*. at 22.
[106] Resolute Rule 73(2)(b) Brief at 12, note 32.
[107] Resolute Rule 73(2)(b) Brief at 13.
[108] Commerce Rule 73(2)(c) Brief at 54. *See* Second Redetermination at 38.
[109] Commerce Rule 73(2)(c) Brief at 27-28, citing *JBF RAK LLC v. United States*, 790 F.3d 1358 at 1368 (Fed. Cir. 2015) (*JBF RAK*).
[110] *Toyo Kohan Co., Ltd. v. United States*, No. 24-00261 (Ct. Int'l Trade May 22, 2026) (*Toyo Kohan*); *Marmen Inc. v. United States*, No. 20-00169 (Ct. Int'l Trade June 15, 2026) (*Marmen IV)*; *Government of Canada v. United States*, No. 23-00187 (Ct. Int'l Trade July 27, 2026) (*Gov't of Canada)*; *Universal Tube and Plastics Indus. Ltd. v. United States,* No. 23-00113 (Ct. Int'l Trade Aug.19, 2026) (*Universal Tube*); *Maquilacero S.A. de C.V. v. United States*, No.

The COALITION notes that in *JBF RAK,* the Federal Circuit confirmed that Commerce does not have the burden of determining the reason for a pattern of significant price differences.[111] The GOC and Resolute have argued that their pricing patterns were due to market volatility, but the COALITION notes that JBF RAK was unsuccessful in arguing that "the pricing pattern found by Commerce was the result of market conditions."[112]

At the hearing before the Panel, the COALITION outlined instances of dumping that could be masked by higher prices in A-to-A comparisons, such as a sale of excess inventory at bargain prices or discounts offered by an exporter in order to gain sales presence in a region.[113] Masked dumping does not have to involve isolated incidents, but can occur intermittently or several times during a period of investigation, for varying reasons. The hallmark is an unusual pricing pattern, something out of the ordinary, which the differential pricing analysis can identify.

The issue is the contribution of the price difference test toward that goal. The GOC and Resolute say that the test produces very high, absurd results, findings that over 90% or even 100% of an exporter's prices are significantly different. It is a puzzling concept that 100% of an exporter's prices could be significantly different, yet that was the finding in *Toyo Kohan* at the Court of International Trade and in several files from July 1, 2025 to April 30, 2026 listed in Attachment 1 to the GOC brief.[114] If all the exporter's prices have red flags, then the flags indicate

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23-00091 (Ct. Int'l Trade Sept.14, 2026) (M*aquilacero*); *Stupp Corp. et al., v. United States*, No. 15-00334 (Ct. Int'l Trade Sept. 15, 2026) (*Stupp II*).

[111] COALITION Rule 73(2)(c) Brief at 34-36.

[112] *Id*. at 36, n.156, citing *JBF RAK*, 790 F.3d at 1368 (Fed. Cir. 2015).

[113] Transcript, June 6, 2023 at 268-70 (Mr. Yocis).

[114] Decision Memorandum, Preliminary Results of the Administrative Review of the Antidumping Duty Order on Certain Uncoated Paper from Brazil, 2023-2024 (July 3, 2025)(4788209-02)100% respondent Suzano; Decision Memorandum, Preliminary Results of the Administrative Review of the Antidumping Order on Acetone from the Republic of Korea and Rescission in Part, 2023-2024 (July 7, 2025)(4789214-02) unchanged in final (Nov. 19, 2025)(4848258-02) 100% respondent KPB; Decision Memorandum, Preliminary Results of the 2023-2024 Administrative Review of the Antidumping Order on Pentafluoroethane from the People's Republic of China (July 7, 2025)(4791219-02) unchanged in final (March 9, 2026)(4892629-02) 100% respondent Sanmei; Post Preliminary Analysis in the Antidumping Duty Administrative Review of Granular Polytetrafluoroethylene Resin from India, 2023-2024 (July 18, 2025)(4797168-01) unchanged in final (Feb. 19, 2026)(48822644-02) 100% respondent GFCL;

nothing. To say that the prices are all significantly different carries no relevant meaning. A finding that all or nearly all the prices are significantly different gives no indication of pricing behavior out of the ordinary.

Given the stark results produced by the price difference test, a review of the test must take those high rates into account. The test does not actually show that the identified individual prices are different from each other. When averaged for each purchaser, region or time period, the targeted average prices are simply outside the relevant ranges for the averages of the comparison groups. Once the exporter's average price for that purchaser, region or time period is found to be outside the comparison range, then all of the exporter's prices to that purchaser, to that region or in that time period pass the price difference test. The goal appears to be to determine whether there is something out of the ordinary relating to a particular purchaser, region or time period. However. if all or nearly all of the exporter's prices have red flags, then nothing is out of the ordinary.

Post-Preliminary Analysis for the Administrative Review of Sodium Nitrate from India, 2022-2024 (July 18, 2025)(4796733-01) 100% respondent Deepak; Post-Preliminary Analysis in the Less-Than-Fair-Value Investigation of Hexamethylenetetramine from Germany (July 18, 2025)(4797971-01) unchanged in final (Sept. 18, 2025)(4828724-02) 100% respondent Prefere; Decision Memorandum for the Preliminary Results of the Antidumping Duty Administrative Review, Citric Acid and Certain Citrate Salts from Colombia, 2023-2024(July 31, 2025)(4804178-02) unchanged in final (April 3, 2026)(4906290-02) 100% respondent Sucroal; Decision Memorandum for the Preliminary Results of the Antidumping Duty Administrative Review, Citric Acid and Certain Citrate Salts from Belgium, 2023-2024 (Aug. 19, 2025)(4812650-02) 100% respondent Citribel; Decision Memorandum for Preliminary Results of the Administrative Review of the Antidumping Duty on Glycine from Japan, 2023-2024 (Sept. 12 2025)(4826558-02) unchanged in final (April 23, 2026)(4916007-02) 100% respondent YGK/Nagase; Decision Memorandum for the Preliminary Results of the Administrative Review of the Antidumping Duty Order on Raw Honey from India, 2023-2024 (Sept. 26, 2025)(4832437-02) 100% respondent Shakti; Decision Memorandum for the Preliminary Results of the Antidumping Duty Administrative Review of Chlorinated Isocyanurates from Spain, 2023-2024 (Sept. 29, 2025)(4833433-02) 100% respondent Ercros; Decision Memorandum for the Preliminary Results of Antidumping Duty Administrative Review of Raw Honey from the Socialist Republic of Vietnam, 2023-2024 (Sept. 29, 2025)(4833766-02) 100% respondent BMT; Decision Memorandum for the Preliminary Results of the Administrative Review of the Antidumping Duty Order on Acetone from Korea, 2024-2025 (Feb. 9, 2026)(4878572-02) 100% Respondent KPB; Decision Memorandum for the Preliminary Affirmative Determination in the Less-Than-Fair-Value Investigation of L-lysine from People's Republic of China (March 2, 2026)(4887139-02) 100% respondent Eppen Group, 100% respondent Zhengzhou Longgu; Decision Memorandum for the Preliminary Results of the Administrative Review of the Antidumping Duty Order on Oil Country Tubular Goods from the Socialist Republic of Vietnam, 2023-2024 (March 9, 2026)(4892584-01) 100% respondent SeAH VINA; Decision Memorandum for the Preliminary Affirmative Determination in the Less-Than-Fair-Value Investigation of Steel Concrete Reinforcing Bar from the Socialist Republic of Vietnam (March 9, 2026)(4892608) 100% respondent Hoa Phat.

The GOC and Resolute have submitted that the price difference test simply reflects volatility in the U.S. market for softwood lumber. The list of sectors associated with 100% findings covers other products: flat-rolled steel in *Toyo Kohan* and various chemicals, oil country tubular goods, paper and raw honey in decisions listed in Attachment 1 to the GOC Brief. If the test is overly sensitive to regular market volatility, then its results are influenced by many factors. A price difference test that produces extremely high results across diverse sectors fails to meet the goal of identifying opportunities for masked dumping.

The GOC and Resolute have pointed to the SAA directive that:

> "in determining whether a pattern of significant price differences exists, Commerce will proceed on a case-by-case basis, because small differences may be significant for one industry or one type of product, but not for another."

They argue that, in support of this obligation, Commerce must consider evidence of market volatility. Commerce, however, contends that it is not required to examine the reasons for masked dumping, relying on the decision of the Federal Circuit in *JBF RAK*. That decision is not strictly binding in the current review, as it dealt with the *Nails* test rather than differential pricing analysis, but prior decisions may be persuasive even if not binding. In the case, JBF RAK was unsuccessful in arguing that its prices that passed the *Nails* test were not dumped because its sales practices meant that it could not target customers, regions or periods of time. The Federal Circuit held that there is no intent requirement in the statute and that Commerce has no obligation to determine "the reasons why there is a pattern of export prices for comparable merchandise that differs significantly among purchaser, regions or time periods."[115] From this finding, Commerce concluded that it has no obligation to consider general evidence of market volatility, but it may be noted that the CAFC was particularly focused on the heavy burden that Commerce would bear if it had to prove

[115] *JBF RAK*, 790 F.3d at 1368 (Fed. Cir. 2015).

intent.[116] The case is not a strong basis on which to maintain that any presumption flowing from the price difference test and the ratio test is irrebuttable.

A finding against the acceptance of market volatility evidence would be inconsistent with the subsequent CAFC decision in *Stupp I.* Both the GOC and Resolute submit that the Second Redetermination must be judged on the substantial evidence standard as well as on questions of law. In *Stupp I*, differential pricing analysis applied, with the mixed method ratio test in place. SeAH, the exporter, argued unsuccessfully that Commerce had to justify the propriety of the ratio test as a matter of law. In finding against SeAH, the Federal Circuit stated that "SeAH was free to make factual arguments regarding why it was inappropriate to apply the ratio test in this case, but it chose not to do so."[117] A litigant submitting evidence of market volatility to contest the finding of a high rate of significantly different prices for the ratio test would be making factual arguments against that test -- exactly what the Federal Circuit approved. Evidence of market volatility to contest the results of the price difference test is admissible. If exporters were following market trends just as domestic producers were doing, the case for dumping is weak.

Not all results in Attachment 1 to the GOC brief are extremely high, but many are. The GOC states that more than half of the rates in Attachment 1 to its Brief are over 90%. As well, according to the GOC, more than 88.5 per cent are over 33% and thus will move through the ratio test to the comparison of A-to-A and A-to-T rates in the meaningful difference test, despite the explicit mention in 19 U.S.C. § 1677f-1(d)(1) that differential pricing analysis is to be the exception and A-to-A or T-to-T comparisons are the primary methods of calculation.

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[116] *See The Timken Company v United States*, 179 F. Supp 3d 1168, 1179 note 12 (Ct. Int'l Trade, May 10, 2016) ("The Federal Circuit's opinion in *JBF RAK* does not appear to speak to a situation where a respondent actually demonstrates that the price differences are not the result of targeting. Although the Federal Circuit expressed concern that 'requiring Commerce to determine the intent of a targeted dumping respondent would create a tremendous burden on Commerce' … such a burden might not exist where a respondent itself provides that information.")

[117] *Stupp I*, 5 F.4th at 1355 (Fed. Cir. 2021).

Commerce and the COALITION have submitted that the applicable standard of review continues to be reasonableness, as found in several recent decisions of the Court of International Trade.[118] The COALITION has noted that the Federal Circuit in a post-*Loper Bright* decision in *Marmen III* confirmed that "the relevant standard for reviewing Commerce's selection of statistical tests and numerical cutoffs is reasonableness."[119] Resolute correctly notes that the CAFC and Court of International Trade do not take precedence over the United States Supreme Court,[120] but the Supreme Court in discussing the interpretation of technical questions is careful to state that "Congress expects courts to do their ordinary job of interpreting statutes, with due respect for the views of the Executive Branch."[121] Commerce has discretion to develop methodologies to carry out its assigned tasks using its technical expertise in economic and accounting matters.

When Congress delegates discretion to an agency, it is the task of the courts to fix the boundaries of that discretion and ensure that the agency remains within them. A price difference test that produces extremely high results across diverse sectors fails to meet the goal of identifying opportunities for masked dumping. In my opinion, the current test is not within the bounds of a reasonable interpretation of 19 U.S.C. § 1677f-1(d)(1). As well, refusal to consider evidence of general market volatility is not justified in the case law.

I would remand the price difference test and the ratio test to Commerce for further explanation in accordance with these reasons.

Dissent, Panelist Savoie (English)

[118] *Toyo Kohan, Marmen IV*, *Gov't of Canada, Universal Tube, Maquilacero*, *Stupp II.*
[119] COALITION Rule 73(2)(c) Brief at 12, citing *Marmen III* 134 F.4th at 1338.
[120] Resolute Rule 73(2)(b) Brief at 7.
[121] *Loper Bright*, 603 U.S. at 403 (2024).

I dissent on the applicable standard of review applied by the majority, in particular to the interpretation of the terms "differ significantly" found in 19 U.S.C. 1677f-1(d). In my view, the majority applies the wrong standard of review.

In its second Redetermination,[122] Commerce held:

> "Thus we find that a two-percent threshold satisfies the statutory directive to determine whether prices "differ significantly" under section 777A(d)(1)(B)(i) of the Act. Commerce's price difference test is a reasonable measure of significant differences. When evaluating reasonableness, Commerce is not required to use the most reasonable method, but a reasonable method."

The Panel's majority concludes : "We find that the price difference test is reviewed on a standard of reasonableness."

Such holding is contrary to *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), and the wording of the applicable statute, 19 U.S.C. 1677f-1(d). *Loper Bright* requires a reviewing court, or this Panel, to give the "best reading" of the statute, not to confirm that Commerce's interpretation of the statute is reasonable. This authority to interpret a statute cannot be delegated (except if there is an explicit delegation of authority, which there is not here, in my view). This is the approach to judicial review since *Loper Bright*.

The majority refers to the CAFC's 2021 holding, in *Stupp Corp. v. United States*, 5 F.4th 1341, 1353 (Fed. Cir. 2021), that: "Our precedents make clear that the relevant standard for reviewing Commerce's selection of statistical tests and numerical cutoffs is reasonableness, not substantial evidence."

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[122] *Certain Softwood Lumber Products from Canada: Final Affirmative Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances*, *Final Results of Redetermination Pursuant to Panel Remand Order*, Secretariat File No. USA-CDA-2017-1904-03, Order, April 30, 2026, p. 29.

However, that decision was made prior to *Loper Bright* and there can be no *stare decisis* attaching to that general finding. *Loper Bright* overrules it while not providing any guidance on any explicit reasonableness standard.

As explained by Panelist Irish, the application of the statute in arriving at a "price difference test" for the present circumstances is in any event unreasonable, a finding with which I agree.

More fundamentally, Commerce's interpretation of 19 U.S.C. 1677f-1(d), and in particular whether "there is a pattern of export prices (or constructed export prices) for comparable merchandise that **differ significantly** among purchasers, regions, or periods of time," is one that must be the "best reading" of the statute until the CAFC clarifies otherwise.

As recognized by the majority:

> "The Loper-Bright Court further stated that, "When the best reading of the statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. . .The Court fulfils that role by recognizing constitutional delegations, fix[ing] the boundaries of [the] delegated authority . . . and ensuring the agency has engaged in 'reasoned decisionmaking' within those boundaries.""

Nothing in that holding is to the effect that delegated decision-making automatically becomes assessed under a standard of "reasonableness". It of course must be "reasoned". However, to follow the words of the Supreme Court, it is the reviewing court, or here, the Panel, which "fixes the boundaries of the delegated authority", without more guidance.

This Panel is of course not bound to follow the half dozen or so CIT decisions which held that the interpretation of the terms "differ significantly" in 19 U.S.C. 1677f-1(d) is to be granted

deference and reviewed under a standard of reasonableness. Indeed, in respect of Commerce's previous adoption of *Cohen's d* to determine differential pricing, some 20 CIT decisions upheld Commerce's approach before it was rejected by the CAFC.[123]

It was argued by Commerce that "significantly" in legislation is like "appropriate" or "reasonable".[124]The latter two terms are used by the Supreme Court in *Loper Bright* as examples of delegated authority.[125] For Commerce, the use of a term like "significantly" would thus imply a delegation of discretion here, to Commerce, under 19 U.S.C. 1677f-1(d).[126]

In interpreting what it means to "differ significantly", including whether Commerce has delegated discretion in determining the existence of "significant" price differences, the usual canons of statutory interpretation apply. This includes the textual meaning as well as dictionary definitions of terms, usage and administrative interpretations, amongst others.

The Merriam Webster defines "significantly" as "in a significant manner: to a significant degree" (e.g. "the salaries differed significantly"). It then defines "significant" as **"**large enough to be noticed or to have an effect".

As for "appropriate", the Merriam Webster defines the word as "right or suited for some purpose or situation". The same dictionary defines "reasonable" as "fair and sensible".

In my view, if "appropriate" and "reasonable" are words that denote delegated discretion, the word "significantly" is not of the same nature. The definition of the first two is "right" and "fair" which naturally leave some level of discretion to the person determining if something is right or fair. As Milton Friedman once wrote in Newsweek (July 4th, 1977):

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[123] *Certain Softwood Lumber Products from Canada :* USA-CDA-2017-1904-03 : Canadian Parties Response to the U.S. Department of Commerce's Notice of Subsequent Authority, 30 September 2026. p. 1, footnotes 1 and 2.
[124] Commerce's Response to Parties' Comments on Final Results of Second Redetermination, June 15, 2026, pp. 8-9.
[125] *Id*.
[126] *Id*.

> "There is no objective standard of 'fairness.' 'Fairness' is strictly in the eye of the beholder... To a producer or seller, a 'fair' price is a high price. To the buyer or consumer, a 'fair' price is a low price. How is the conflict to be adjudicated?"

However, "significantly" and "significant" are defined as a threshold reached where a situation is "noticed" or will "have an effect". There is a bright line to noticing a situation or where it has an effect, which is different in nature from something being or perceived as right or fair. Noticing or having an effect is something that can be evaluated objectively, quantified.

The example given by the Merriam Webster of "the salaries differed significantly" is also interesting. It recalls pay equity issues, where comparability and difference of salaries has been addressed by courts. Whether something is significant (or differs significantly) or not can be controlled by objective or legal factors that do not imply delegated discretion.

The SAA supports such a reading, when it states:

> "in determining whether a pattern of significant price differences exists, Commerce will proceed on a case-by-case basis, because small differences may be significant for one industry or one type of product, but not for another."

This means significant price difference cannot be evaluated in a one size fits all approach. It also supports the idea that the reviewing court, or here the Panel, must verify that Commerce has indeed proceeded on a case-by-case basis, rather than giving Commerce deference.

As such, the "best reading" review standard of the statute applies in relation to whether prices "differ significantly".

The Panel of course faces the classic conundrum of judicial review in modern complex democracies subject to the overriding principle of the rule of law. Administrative agencies, like Commerce, have expertise and are better equipped than this Panel to create complex formulas and

make complex calculations to determine whether dumping exists. Commerce's expertise is recognized by courts independently of the applicable standard of review. But *Chevron* does not apply anymore and *Loper Bright* requires this Panel to exercise either full control ("best reading") or otherwise "fix the boundaries of the delegated authority" (if any) over the interpretation of a statute. How Commerce's recognized expertise fits within this new standard for review is for the CAFC to clarify in the future, but this recognition remains distinct from the applicable standard of review.

Moreover, and as held in *Loper Bright,* 603 U.S. at 413 : "courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous."

Absent post-*Loper Bright* binding guidance from the CAFC on issues directly applicable to this Panel, I find the applicable standard of review for this case can be stated as follows: the Panel must determine whether Commerce adopted the "best reading" of 19 U.S.C. 1677f-1(d) in respect of the terms "differ significantly". If not, the principle is that the Panel remands.

The conundrum of agency expertise can be dealt with for now in the following manner. This Panel will obviously not create itself a differential pricing methodology. However, it can approach the terms "differ significantly" from the perspective of asking whether the approach proposed by Commerce is the "best reading" of the statute based on relevant tools of statutory construction, and based on the record, as the record may be relevant. If Commerce's approach is not the "best reading", then the Panel should in principle remand, with adequate instructions. Commerce has an affirmative obligation to provide a methodology which is the "best reading" of the statute where there is no intended delegation of authority, as here.

I also hold that the record must be taken into consideration, in addition to relevant tools of statutory construction, in determining the "best reading" of "differ significantly" under 19 U.S.C.

1677f-1(d). The SAA states Commerce must proceed on a case-by-case basis for each industry. The specific characteristics of an industry, as found in the record, must form part of the "best reading" made by Commerce and confirmed by a court or this Panel.

The seasonal changes in prices of softwood lumber is an important aspect of the industry and must be taken into account in how Commerce interprets (and applies) "differ significantly". There is enough evidence on the record to this effect,[127] which cannot be ignored.[128]

For the above reasons, I believe the majority is in error in respect of the applicable standard of review. For the interpretation of the terms "differ significantly" under 19 U.S.C. 1677f-1(d), and in particular in respect of the "price difference test" applied by Commerce, I find that the Panel must control Commerce's Redetermination by asking whether Commerce applied the "best reading" of the Statute, as required by *Loper Bright* and not contradicted by any CAFC decisions since.

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[127] *Certain Softwood Lumber Products from Canada: Final Affirmative Determination of Sales at Less Than Fair Value and Affirmative Final Determination of Critical Circumstances*, *Final Results of Redetermination Pursuant to Panel Remand Order*, Secretariat File No. USA-CDA-2017-1904-03, Order, April 30, 2026, p. 26-28. ("*GOC's Comments* … The GOC has presented evidence that pricing in the overall U.S. lumber market is highly volatile and was subject to dramatic changes over the course of the POR, and Commerce must account for this evidence. … *Resolute's Comments* ... Exhibit 44 to the Petition contains a summary of Random Lengths Framing Lumber Composite Index (Composite Index) weekly from January 2013 to November 2016. The Composite Index is a "weighted average of prices for fifteen benchmark lumber products of various North American species." The data were all taken from the Random Lengths' Weekly report on North American Forest Products Markets, meaning the Composite Index includes both U.S. and Canadian prices. The U.S. International Trade Commission (ITC) described Composite Index as "a guideline and benchmark in assessing pricing trends for many specific product groups as well as the larger U.S. softwood lumber industry" which U.S. nad Canadian producers typically use as price reference in negotiating with customers. The Composite Index is another means for Commerce to look at overall price volatility that it has not considered, rather than a fixed arbitrary threshold. Petitioner has placed a report from CME Group on the record that is instructive in understanding lumber pricing. The report states that lumber prices have the typical seasonal pattern that appears to be tied into the residential housing construction cycle, with prices peaking in summer after which they drop off sharply. The report corresponds to information in Resolute's public financial reporting. Without accounting for this record evidence, the Draft Redetermination are a conclusory exercise disguised as sound statistics.")

[128] *Id.* ; Resolute's Rule 73(2)(b) Brief On Final Result of Redetermination Pursuant to Binational Panel Order, May 26, 2026, pp. 25-26.

On the “2 percent test” and Commerce’s application of the “price difference test” I am in general agreement with the reasons of Panelist Irish’s partial dissent, which show that Commerce did not adopt the “best reading” of the statute.

I would therefore remand in accordance with the present reasons. These reasons require Commerce to approach all three parts of its price difference test (the 2 per cent test, the ratio test, and the meaningful difference test) under a “best reading” of the statute standard of review, which they do not. I would also remand in accordance with the reasons of Panelist Irish, as they are compatible with the present reasons.

Opinion Divergente, Membre du groupe spécial Savoie (Français)

Je joins une opinion divergente à la décision du groupe spécial sur le critère d'examen appliqué par la majorité, en particulier sur l'interprétation des mots « diffère significativement » ("differ significantly") qui se trouvent à l'article 19 U.S.C. 1677f-1(d). A mon avis, la majorité du groupe spécial n'applique pas le bon critère d'examen.

Dans sa seconde Redétermination,[129] le Département du Commerce conclut :

TRADUCTION

« Ainsi, nous déterminons qu'un seuil de deux pour cent satisfait la directive législative de déterminer si … [une tendance ou structure de] prix [d'export] « diffère significativement » sous l'article 777A(d)(1)(B)(i) de la Loi. Le test de différence de prix du Département du Commerce est une approche raisonnable aux différences significatives. En évaluant ce qui est raisonnable, le Département du Commerce n'est pas requis d'utiliser la méthode la plus raisonnable, mais une méthode raisonnable. »

VERSION ORIGINALE

"Thus we find that a two-percent threshold satisfies the statutory directive to determine whether prices "differ significantly" under section 777A(d)(1)(B)(i) of the Act. Commerce's price difference test is a reasonable measure of significant differences. When evaluating reasonableness, Commerce is not required to use the most reasonable method, but a reasonable method."

Dans sa décision, la majorité du groupe spécial conclut :

[129] *Certains produits de bois d'œuvre résineux en provenance du Canada : Décision affirmative finale concluant à l'existence de ventes à des prix inférieurs à la juste valeur et détermination finale de circonstances critiques, Résultats finaux de redétermination en vertu de la décision de renvoi du groupe spécial*, No. de dossier du Secrétariat USA-CDA-2017-1904-03, Décision, 30 avril 2026, p. 29 (« Redétermination »).

TRADUCTION

« Nous estimons que le test de différence de prix est révisé sur un critère d'examen de raisonnabilité. »

VERSION ORIGINALE

"We find that the price difference test is reviewed on a standard of reasonableness."

Une telle décision est contraire à l'arrêt de la Cour suprême *Loper Bright Enterprises c. Raimondo*, 603 U.S. 369 (2024), ainsi qu'à la législation applicable, soit 19 U.S.C. 1677f-1(d). *Loper Bright* requiert de la cour de révision, ou ici du groupe spécial, d'adopter la « meilleure interprétation » de la législation applicable plutôt que de confirmer comme raisonnable toute interprétation qui en serait faite par le Département du Commerce. Cette autorité sur l'interprétation de la législation ne peut être déléguée par la cour de révision (excepté si une délégation d'autorité explicite est accordée à l'administration par la législation, ce qui n'est pas le cas ici). C'est là l'approche en matière de révision judiciaire depuis *Loper Bright*.

La majorité cite comme suit l'arrêt de la Cour d'appel du Circuit fédéral rendu en 2021, *Stupp Corp. c. United States*, 5 F.4th 1341, 1353 (Fed. Cir. 2021):

TRADUCTION

« Nos précédents sont clairs à l'effet que le critère d'examen pertinent d'une détermination de tests statistiques ou d'un seuil numérique, par le Département du Commerce, est la raisonnabilité, et non la preuve substantielle. »

VERSION ORIGINALE

"Our precedents make clear that the relevant standard for reviewing Commerce's selection of statistical tests and numerical cutoffs is reasonableness, not substantial evidence."

Cependant, cette décision a été rendue avant *Loper Bright* et il ne peut y avoir de précédent obligatoire aujourd'hui sur le fondement de cet énoncé général. *Loper Bright* renverse cette décision sans fournir de direction explicite sur tout critère d'examen de raisonnabilité.

Tel que l'explique la membre du groupe spécial Irish, l'interprétation de la législation par le Département du Commerce qui mène au « test de différence de prix » (« price difference test »), tel qu'appliqué ici, est, en tous les cas, déraisonnable. C'est une conclusion à laquelle je souscris.

Plus fondamentalement, l'interprétation faite par le Département du Commerce de 19 U.S.C. 1677f-1(d) doit être la « meilleure interprétation » de la législation jusqu'à ce que la Cour d'appel du Circuit fédéral en décide autrement, en particulier afin de déterminer s'il existe :

TRADUCTION

> « une tendance ou structure de prix d'export (ou de prix d'export déterminés ou construits) pour une marchandise comparable qui **diffère significativement** entre acheteurs, régions et périodes temporelles »

VERSION ORIGINALE

> "a pattern of export prices (or constructed export prices) for comparable merchandise that **differ significantly** among purchasers, regions, or periods of time"

Tel que l'a reconnu la majorité du groupe spécial :

TRADUCTION

> « La Cour suprême dans *Loper Bright* a par ailleurs énoncé que : « Lorsque la meilleure interprétation de la législation est qu'elle délègue une autorité discrétionnaire à l'administration, le rôle de la cour de révision sous le *Administrative Procedure Act* est, comme il l'a toujours été, d'interpréter indépendamment la législation et de donner effet à l'intention du Congrès, sujet aux limites constitutionnelles. . . La Cour remplit ce rôle en

reconnaissant les délégations constitutionnelles, en fixant les limites de l'autorité déléguée … et en assurant que l'administration s'est bien livrée à une prise de décision raisonnée à l'intérieur de ces limites. » »

VERSION ORIGINALE

"The Loper-Bright Court further stated that, "When the best reading of the statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits. . .The Court fulfils that role by recognizing constitutional delegations, fix[ing] the boundaries of [the] delegated authority . . . and ensuring the agency has engaged in 'reasoned decisionmaking' within those boundaries.""

Rien dans cet énoncé ne prévoit qu'une décision administrative déléguée est automatiquement examinée en vertu d'un critère d'interprétation raisonnable. Cette décision doit évidemment être « raisonnée ». Toutefois, pour suivre les mots de la Cour suprême, c'est à la cour de révision, ou ici, au groupe spécial, de « fixer les limites de l'autorité déléguée », sans plus de précision (au présent stade de la jurisprudence).

Le groupe spécial n'est évidemment pas non plus dans l'obligation de suivre la demi-douzaine de décisions de la Court of International Trade qui jugent que l'interprétation des mots « diffère significativement » dans 19 U.S.C. 1677f-1(d) doit être abordée avec déférence et en vertu d'un critère d'examen d'interprétation raisonnable. En effet, en ce qui concerne l'adoption par le Département du Commerce du test *Cohen's d* pour déterminer l'existence de tarification différenciée, la Court of International Trade avait confirmé dans quelque 20 décisions l'approche

du Département du Commerce avant que celle-ci ne soit infirmée par la Cour d'appel pour le Circuit fédéral.[130]

Il a été plaidé par le Département du Commerce que le mot « significativement » ("significantly") dans la législation est comparable aux mots « approprié » ("appropriate") ou « raisonnable » ("reasonable").[131] Ces deux derniers mots ont été utilisés par la Cour suprême dans *Loper Bright* comme exemples de termes établissant une autorité déléguée, lorsqu'utilisés par la législation.[132] Pour le Département du Commerce, l'usage d'un mot comme « significativement » ("significantly") impliquerait de la même manière une discrétion déléguée au Département du Commerce en matière d'interprétation des termes législatifs pertinents sous 19 U.S.C. 1677f-1(d).[133]

Les méthodes habituelles d'interprétation législative s'appliquent lorsqu'on doit interpréter ce que signifie « diffère significativement », incluant pour déterminer si le Département du Commerce possède une discrétion déléguée afin d'établir l'existence d'une différence « significative » en matière de tendance et structure des prix d'export. Ces méthodes d'interprétation incluent le sens ordinaire et les définitions de dictionnaire des mots, leur usage, ainsi que les interprétations administratives.

Le dictionnaire Merriam Webster définit ainsi « significativement » ("significantly"): "d'une manière significative: à un degré significatif » (par exemple « les salaires diffèrent de manière significative ») ("in a significant manner: to a significant degree" (e.g. "the salaries differed significantly")). Le Merriam Webster définit ensuite « significatif » (significant) comme

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[130] *Certains produits de bois d'œuvre résineux en provenance du Canada :* USA-CDA-2017-1904-03 : Réponse des parties canadiennes à la notification de jugements subséquents du Département du Commerce des Etats-Unis d'Amérique, 30 septembre 2026, p. 1, notes de bas de page 1 et 2.
[131] Réponse du Département du Commerce aux commentaires des parties sur les Résultats finaux de la seconde Redétermiantion, 15 juin 2026, pp. 8-9.
[132] *Id*.
[133] *Id*.

« suffisamment large pour être remarqué ou avoir un effet » (“large enough to be noticed or to have an effect”).

En ce qui concerne « approprié » (“appropriate”), le Merriam Webster définit le mot comme « bien ou adapté à un objectif ou une situation » (“right or suited for some purpose or situation”). Le même dictionnaire définit ensuite « raisonnable » (« reasonable ») comme « juste et sensé » (“fair and sensible”).

A mon avis, si « approprié » (“appropriate”) et « raisonnable » (“reasonable”) sont des mots qui dénotent une discrétion déléguée, le mot « significativement » (“significantly”) n’est pas de même nature. La définition des deux premiers mots est « bien » (“right”) et « juste » (“fair”), ce qui laisse naturellement un certain niveau de discrétion à la personne déterminant si quelque chose est « bien » ou « juste ». Comme l’a déjà écrit Milton Friedman dans Newsweek (4 juillet 1977) :

TRADUCTION

« Il n’y a pas de standard objectif pour déterminer ce qui est ‘juste’ ou ‘équitable’ [NOTE DE TRADUCTION : ‘fairness’ en anglais peut englober autant justice qu’équité dans le présent contexte]. La ‘justice’ (ou l’‘équité’) est strictement du point de vue l’observateur… Pour un producteur ou vendeur, le ‘juste’ prix sera un prix élevé. Pour un acheteur ou un consommateur, le ‘juste’ prix sera un bas prix. Comment trancher ce conflit ?

VERSION ORIGINALE

“There is no objective standard of ‘fairness.’ ‘Fairness’ is strictly in the eye of the beholder... To a producer or seller, a ‘fair’ price is a high price. To the buyer or consumer, a ‘fair’ price is a low price. How is the conflict to be adjudicated?”

Cependant, « significativement » (“significantly”) et « significatif » (“significant”) sont définis comme un seuil atteint dans une situation « remarquée » ou « qui a un effet ». Il y a une ligne claire et donc un critère tranché permettant de « remarquer » ou « constater un effet », ce qui est de nature différente que conclure que quelque chose est ou est perçu comme « bien » (“right”) ou « juste » (“fair”). Remarquer quelque chose ou avoir un effet constitue ou recontre un seuil qui peut être évalué objectivement, quantifié.

L’exemple donné par le dictionnaire Merriam Webster, soit « les salaires diffèrent de manière significative » (“the salaries differed significantly”), est aussi intéressant. Cet exemple rappelle les questions d’équité salariale où comparaison et différence de salaires sont des questions qui ont été abordées par les tribunaux. Savoir si quelque chose est significatif (ou diffère de manière significative) ou non est contrôlé par des facteurs objectifs ou juridiques qui n’impliquent pas de discrétion déléguée.

Le Statement of Administrative Action (SAA) soutient une telle interprétation lorsqu’il prévoit :

TRADUCTION

> « En déterminant si une tendance ou structure de prix significativement différents existe, le Département du Commerce devra procéder au cas par cas, parce que de petites différences peuvent être significatives dans une industrie ou pour un type de sous-produit, alors qu’elles peuvent ne pas l’être dans une autre industrie ou pour un autre type de sous-produit. »

VERSION ORIGINALE

> “in determining whether a pattern of significant price differences exists, Commerce will proceed on a case-by-case basis, because small differences may be significant for one industry or one type of product, but not for another.”

Cela signifie qu'une différence significative sur la tendance ou structure des prix d'export ne peut être évaluée selon une approche universelle ou une solution toute faite. Cela soutient aussi l'idée que la cour de révision, ou ici le groupe spécial, doit vérifier que le Département du Commerce a en effet procédé au cas par cas, et donc de manière individualisée, plutôt que de revoir la détermination du Département du Commerce avec déférence.

Ainsi, le critère d'examen de la « meilleure interprétation » législative s'applique pour déterminer si la tendance ou structure des prix d'export « diffère significativement ».

Le groupe spécial fait évidemment face au dilemme classique sur le critère d'examen ou de révision dans les démocraties complexes modernes également assujetties de manière plus générale à la primauté du droit. L'administration, comme le Département du Commerce, possède une expertise et est mieux outillée que le groupe spécial pour créer des formules et effectuer des calculs complexes pour établir si du dumping existe. L'expertise du Département du Commerce est reconnue par les tribunaux indépendamment et séparément du critère d'examen. Cependant, *Chevron* a été renversé et *Loper Bright* requiert que le groupe spécial exerce soit un plein contrôle (la « meilleure interprétation ») ou autrement « fixe les frontières de l'autorité déléguée » (dans la mesure où toute autorité est déléguée) sur l'interprétation de la législation. Il reviendra à la Cour d'appel du Circuit fédéral de clarifier dans le futur comment l'expertise reconnue du Département du Commerce s'insère dans ce nouveau critère d'examen, mais la reconnaissance de cette expertise demeure distincte du critère d'examen applicable.

Aussi, et tel qu'établi dans *Loper Bright,* 603 U.S. à 413 :

TRADUCTION

« les cours n'ont pas à, et sous le *Administrative Procedure Act* ne peuvent pas déférer à l'interprétation de la loi faite par l'administration simplement parce que la législation est ambigüe. »

VERSION ORIGINALE

"courts need not and under the APA may not defer to an agency interpretation of the law simply because a statute is ambiguous."

En l'absence de jurisprudence post-*Loper Bright* de la Cour d'appel du Circuit fédéral établissant un droit applicable clair sur les questions devant le groupe spécial, j'estime que le critère d'examen applicable dans la présente affaire peut être résumé comme suit : le groupe spécial doit déterminer si le Département du Commerce a adopté la « meilleure interprétation » de 19 U.S.C. 1677f-1(d) concernant les mots « diffère significativement ». Si tel n'est pas le cas, en principe le groupe spécial doit renvoyer l'affaire au Département du Commerce pour une nouvelle détermination.

Ce dilemme sur l'expertise de l'administration peut être résolu de la manière suivante dans le cas présent. Il ne revient évidemment pas au groupe spécial de créer lui-même une méthodologie pour déterminer l'existence d'une différenciation en matière de prix. Cependant, le groupe spécial peut aborder et interpréter les mots « diffère significativement » en se demandant si l'approche proposée par le Département du Commerce est bel et bien la « meilleure interprétation » de la législation, sur le fondement des outils d'interprétation disponibles, et aussi sur le fondement du dossier factuel, dans la mesure de sa pertinence, en l'espèce, sur cette question. Si l'approche du Département du Commerce n'est pas la « meilleure interprétation », le groupe spécial doit alors en principe renvoyer l'affaire au Département, avec instructions adéquates. Le Département du Commerce a l'obligation positive de fournir une méthodologie qui constitue la « meilleure

interprétation » de la législation lorsqu'il n'y a pas d'intention de déléguer l'autorité interprétative, tel qu'en l'espèce.

J'estime qu'il faut aussi tenir compte du dossier factuel, en l'espèce, lorsque vient le temps d'établir la « meilleure interprétation » de « diffère significativement » sous 19 U.S.C. 1677f-1(d). Le SAA énonce que le Département du Commerce doit procéder au cas par cas pour chaque industrie. Les caractéristiques propres à chaque industrie, tel qu'établis par le dossier factuel, doivent former partie de la « meilleure interprétation » faite par le Département du Commerce et confirmée par une cour de révision ou par ce groupe spécial.

Les changements saisonniers des prix du bois d'œuvre résineux constituent un important aspect de cette industrie et doivent être pris en compte dans la manière dont le Département du Commerce interprète (et applique) « diffère significativement ». Il existe suffisamment de preuve au dossier à cet égard,[134] qui ne peut être ignorée.[135]

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[134] *Certains produits de bois d'œuvre résineux en provenance du Canada : Décision affirmative finale concluant à l'existence de ventes à des prix inférieurs à la juste valeur et détermination finale de circonstances critiques, Résultats finaux de redétermination en vertu de la décision de renvoi du groupe spécial*, No. de dossier du Secrétariat USA-CDA-2017-1904-03, Décision, 30 avril 2026, p. 26-28. ("*Commentaires du gouvernement du Canada* … Le gouvernement du Canada a soumis de la preuve à l'effet que les prix dans l'ensemble du marché états-unien est hautement volatile et sujet à des changements dramatiques durant la période d'enquête, et que le Département du Commerce doit tenir compte de cette preuve. … *Commentaires de Produits forestiers Résolu …* La Pièce 44 annexée à la Demande contient un sommaire de L'Index composite des longueurs aléatoires de bois de charpente hebdomadaire (Index composite) de janvier 2013 à novembre 2016. L'Index composite est une « moyenne pondérée des prix de quinze prix de référence de diverses espèces nord-américaines de bois d'œuvre résineux ». Les données ont toutes été prises dans le Rapport Hebdomadaire de Longueurs Aléatoires Nord-Américain de Produits Forestiers, signifiant que l'Index composite inclut autant les prix canadiens qu'états-uniens. La U.S. International Trade Commission (ITC) décrit l'Index composite comme « une ligne directrice et une référence dans l'évaluation des tendances des prix de beaucoup de groupes de produits spécifiques ainsi que de l'industrie plus large états-unienne du bois d'œuvre résineux », que les producteurs états-uniens et canadiens utilisent typiquement comme référence en matière de prix dans les négociations avec les acheteurs. L'Index composite est un autre moyen pour le Département du Commerce d'examiner la volatilité générale des prix qui n'a pas été considérée, plutôt que de fixer un seuil arbitraire. Le Demandeur a soumis un rapport du CME Group au dossier qui est d'intérêt pour comprendre les prix du bois de charpente. Ce rapport affirme que les prix du bois de charpente ont une tendance saisonnière typique qui semble être liée au cycle de construction d'habitations résidentielles, avec les prix culminant durant l'été, après quoi ils chutent brusquement. Ce rapport correspond à l'information contenue dans les divulgations financières publiques de Produits forestiers Résolu. Sans tenir compte de cette preuve au dossier, la Redétermination proposée constitue un exercice non-étayé et infondé se déguisant en statistiques fiables et solides fondés sur une rigoureuse méthodologie. »

[135] *Id.* ; Mémoire de Produits forestiers Résolu sous la Règle 73(2)(b) sur le Résultat final de la Redétermination en vertu de la Décision du groupe spécial, 26 mai 2026, pp. 25-26.

Pour les raisons qui précèdent, la majorité est dans l'erreur en ce qui concerne le critère d'examen. Pour l'interprétation des mots « diffère significativement » sous 19 U.S.C. 1677f-1(d), et en particulier en ce qui concerne le « test de différence de prix » ("price difference test") appliqué par le Département du Commerce, je conclus que le groupe spécial doit examiner la Redétermination du Département du Commerce en se demandant si le Département a appliqué la « meilleure interprétation » de la législation, tel que requis par *Loper Bright*, et de manière non contredite depuis par la jurisprudence de la Cour d'appel du Circuit fédéral.

Sur le « test de 2 pour cent » ("2 percent test") et l'application par le Département du Commerce du « test de différence de prix » ("price difference test"), je suis généralement en accord avec les motifs de l'opinion partiellement divergente de la membre du groupe spécial Irish, qui démontrent que le Département du Commerce n'a pas adopté la « meilleure interprétation » de la législation.

J'ordonnerais donc un renvoi au Département du Commerce pour une nouvelle détermination sur le fondement des présents motifs. Ceux-ci requièrent du Département du Commerce d'aborder les trois aspects de son « test de différence de prix » ("*price difference test*") (le test de 2 pour cent, le test du ratio, et le test de la différence significative) ("the 2 per cent test, the ratio test, and the meaningful difference test") sur le fondement d'un critère d'examen de la « meilleure interprétation » législative, ce qui n'est pas le cas en l'espèce. J'ordonnerais aussi le renvoi en accord avec les motifs de la membre du groupe spécial Irish, dans la mesure où ils sont compatibles avec les présents motifs.

Issue date: November 6, 2026

Signed in the original by:

/s/ Daniel B. Pickard
Daniel B. Pickard, Chairman

/s/ Cindy G. Buys
Cindy G. Buys

/s/ Maureen Irish
Maureen Irish (dissenting in part)

/s/ Pierre-Olivier Savoie
Pierre-Olivier Savoie (dissenting)

/s/ Christine M. Streatfeild
Christine M. Streatfeild